

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TREYVEON LANIER WILSON,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 272240

Wayne Circuit Court

LC No. 06-004271-01

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for which he was sentenced to 27 to 240 months in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The victim testified that she and defendant were play-fighting in his bedroom. Defendant hid her set of keys somewhere in his bedding. Defendant left the room momentarily. When he returned, the victim was laying on the bed searching for her keys. The victim stated that defendant pulled down her pants, exposed his penis, and then penetrated her anus with his penis. Afterward, the victim found signs of rectal bleeding. A doctor who examined her later that night found visible rectal bleeding. Forensic analysis of rectal swabs and smears was negative for semen and sperm, but positive for blood.

Defendant admitted that he was home at the time of the alleged offense, but said he was sick in bed and that he did not sexually assault the victim. Two of defendant's teachers testified that he had a reputation for truthfulness. Defendant's mother, who had been out during the evening, testified that when she arrived home after the alleged assault occurred, the victim seemed perfectly normal. She also confirmed that defendant was ill that day.

On appeal, defendant first contends that he was denied a fair trial due to prosecutorial misconduct. "[P]reserved allegations of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial." *People v Akins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *Id.*; *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

The prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may not make a statement of fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

The prosecutor's statement that defendant "must have done a heck of a lot of damage to her anus" was proper comment on and expressly related to the victim's testimony that she experienced rectal pain over the next few days. While the prosecutor's statement that 12-year-olds do not have rectal exams or visit gynecologists was not supported by the evidence, the prosecutor was asking the jury to rely on its general knowledge and everyday experience in evaluating the victim's credibility, which was not improper. *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992); CJI2d 3.5(9); CJI2d 3.6(2), (3)(h).

It is improper for the prosecutor to personally attack defense counsel, such as by questioning his veracity or suggesting that he intentionally tried to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The prosecutor accused defense counsel of being dishonest when he made a statement that does not appear to have been supported by the evidence. However, the court immediately instructed the jurors that the lawyers' arguments were not evidence and that they were to rely on their own independent recollection of the testimony. Instructions are presumed to cure most errors and jurors are presumed to follow their instructions. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005).

Defendant next contends that he is entitled to a new trial due to ineffective assistance of counsel. Specifically, defendant contends that defense counsel was made aware of potentially improper communication between a juror and defendant's father and was ineffective for failing to investigate the matter and seek relief in the event that evidence of wrongdoing was uncovered. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

A defendant is entitled to a new trial due to juror misconduct "only where the misconduct was such that it affected the impartiality of the jury or disqualified its members from exercising the powers of reason and judgment." *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). When the misconduct consists of some extrinsic influence on the jury's deliberations and verdict, the defendant must show that the jury was exposed to extraneous influences and that the extraneous influences "created a real and substantial possibility that they

could have affected the jury's verdict." *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). With respect to the latter point, the defendant must "demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict." *Id.* at 89.

At sentencing, the court was advised that there might, at some point during a break in the trial, have been contact between defendant's father and the jury foreman. Sometime after trial, defendant's father purportedly received a letter from the foreman and defendant's father gave the letter to another relative to take to court. The letter apparently referenced some contact between the foreman and defendant's father. The court and defense counsel both stated that the letter did not make sense. There was also a reference to a taped conversation between the foreman and defendant's father. Defense counsel stated that an informal transcription of the tape did not contain "unequivocal information that there had been jury tampering."

We find no basis for concluding that counsel was ineffective for failing to move for a mistrial before the verdict was rendered because the only information available to him at the time indicated that no improper communication had occurred. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Further, the record does not establish that counsel was ineffective for failing to investigate the matter further after trial. The record shows that after trial there was some contact between the foreman and the father. It does not show that the foreman and the father had contact during trial regarding any matter that was substantially related to a material aspect of the case. Therefore, we cannot find that counsel's performance was objectively unreasonable.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto